

OMB Controls on Agency Mandatory Spending Programs: “Administrative PAYGO” and Related Issues for Congress

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Summary

On May 23, 2005, during President George W. Bush's second term, then-Office of Management and Budget (OMB) Director Joshua B. Bolten issued a memorandum to the heads of agencies. The memorandum announced that OMB would involve itself systematically in some aspects of how agencies execute laws related to mandatory spending. Under the process outlined in the OMB memorandum, if an agency wished to use discretion under current law in a way that would "increase mandatory spending," the memorandum required the agency to propose the action to OMB. Such actions might include regulations, demonstration program notices, and other forms of program guidance. For purposes of OMB's process, an *increase* was defined as spending more than the amount that the Administration assumed in its most recent projection of what is required under current law to fund the mandatory spending program. To offset such a difference in spending, the memorandum also required the agency to propose actions that would "comparably reduce" mandatory spending. The memorandum did not address, however, whether agencies' administrative actions and corresponding spending changes would be consistent with congressional intent or expectations, or whether agencies' proposals and OMB's decisions would be transparent to Congress and the public.

For the most part, mandatory spending programs are provided for in substantive laws under the jurisdiction of House and Senate authorizing committees. The Administration characterized the OMB review process as "augmenting its ... controls" on agency decisions. It also referred to the process as "administrative PAYGO." In using the term "PAYGO," the Administration juxtaposed this OMB involvement in agency decision making with a statutory and comparatively transparent mechanism that Congress has used when carrying out its legislative function.

In 2009, the Barack Obama Administration said it would continue the OMB memorandum's process. After several years of implementation, however, very little is publicly known about the scope and effect of OMB's process, the rationales for OMB determinations, or whether the process has achieved its stated purpose of constraining mandatory spending. In one case, concerning a program in the U.S. Department of Agriculture, some details about OMB's process were disclosed publicly in June 2010. The disclosure prompted congressional concerns about the relationships between congressional intent, agency policy implementation, and the role of OMB. Even though OMB's process is not transparent, it is possible to analyze some of the memorandum's other potential implications, if its process were used. While potentially limiting spending, the OMB process may have measurable effects on program outcomes for entitlement programs, for example, and may impose administrative burdens on federal agencies. Moreover, if agencies experience difficulty in identifying plausible offsets, it is conceivable that agencies may choose to not consider, pursue, or submit to OMB an administrative action that would cost money, regardless of the agency's perception of a policy's merits or whether it would be consistent with congressional intent. Differences may arise between OMB and CBO baselines of projected federal spending.

In approaching the subject of OMB controls on agency mandatory spending, Congress might assess at least five general options. First, if Congress sees no need to engage in lawmaking or oversight of the process, it might continue with the status quo. Second, if Congress wished to learn more about the process, Congress could conduct oversight. If Congress wished to address the topic prospectively through lawmaking, Congress might consider three other options: increasing transparency of OMB's process, legislating in greater detail, or modifying how OMB's process operates.

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On May 23, 2005, during the first year of President George W. Bush's second term, OMB issued a memorandum to the heads of departments and agencies.¹ (See **Appendix A** for a facsimile of the memorandum.) Joshua B. Bolten, Director of OMB at that time, wrote that "effective immediately," OMB would involve itself systematically in some aspects of how agencies execute laws related to mandatory spending. For the most part, mandatory spending programs are provided for in substantive laws under the jurisdiction of House and Senate authorizing committees. Congress typically vests authority to implement these laws in agencies. Mandatory spending accounts for more than half of the federal government's annual outlays.² (See **Appendix B** for tabular displays of FY2009 mandatory outlays broken out by authorizing committee and programmatic area.) Discretionary spending, by contrast, is provided in annual appropriations acts under the jurisdiction of the House and Senate Appropriations Committees.

In issuing the OMB memorandum, the Bush Administration's stated goal was to restrain federal spending growth for mandatory spending programs. If an agency wished to use discretion under current law in a way that would "increase mandatory spending," the memorandum required the agency to propose the action to OMB. For purposes of OMB's process, an *increase* was defined as spending more than the amount that the Administration assumed in its most recent projection of what is required under current law to fund the mandatory spending program. To offset such a difference in spending, the memorandum also required the agency to propose actions that would "comparably reduce" mandatory spending. The memorandum did not address, however, whether agencies' administrative actions and corresponding spending changes would be consistent with congressional intent or expectations, or whether agencies' proposals and OMB's decisions would be transparent to Congress and the public. The Administration elsewhere characterized the process as "augmenting its ... controls" on agency decisions, and, in addition, referred to the process as "administrative PAYGO."³ In using the term "PAYGO," the Administration juxtaposed this OMB involvement in agency decision making with a different, statutory mechanism that Congress has used when carrying out its power of the purse and legislative function (see **Box 1**). In 2009, the Barack Obama Administration said it would continue the OMB memorandum's process.⁴ After several years of implementation, however, very little is publicly known about the scope and effect of OMB's process or the rationales for OMB determinations. In one case, some details about OMB's process were disclosed publicly in June 2010, which prompted congressional concerns about agency policy implementation and the role of OMB.

Using available information, this CRS report focuses first on the OMB May 2005 memorandum and the process it outlines. The report then discusses one case where the process appears to have been implemented. It then discusses other potential implications, if the OMB process were widely utilized in practice. Next, the report discusses potential options for Congress. Finally, **Appendix C** of the report discusses how Congress in other contexts has responded legislatively to the prospect of (1) agencies operating under broad grants of discretion to implement laws, and (2) the

¹ U.S. Executive Office of the President, Office of Management and Budget (hereafter OMB), memorandum from Joshua B. Bolten, Director of OMB, to heads of departments and agencies, "Budget Discipline for Agency Administrative Actions," M-05-13, May 23, 2005, at http://www.whitehouse.gov/omb/memoranda_2005/.

² U.S. Congressional Budget Office (hereafter CBO), *The Budget and Economic Outlook: Fiscal Years 2010 to 2020*, January 2010, p. 51. Mandatory spending principally funds entitlement programs such as Medicare, but it also funds programs of a mandatory nature that are not entitlements. Some entitlement spending is funded in annual appropriations acts. The spending level for these appropriated entitlements is based on criteria established in authorizing statutes, and the amount provided in appropriations acts is based on meeting this projected level. For more information, see CRS Report RL33074, *Mandatory Spending Since 1962*, by D. Andrew Austin and Mindy R. Levit.

³ OMB, *Budget of the U.S. Government, Fiscal Year 2006* (Washington: GPO, 2005), p. 27.

⁴ OMB, *Budget of the U.S. Government, Fiscal Year 2010, Analytical Perspectives* (Washington: GPO, 2009), p. 215.

President's involvement in agency decision making through OMB. This report's analysis draws on these precedents, which may inform congressional consideration of options related to the OMB memorandum and its use on behalf of the President.

OMB Memorandum and Related Announcements

February 2005 Bush Administration Announcement

The Bush Administration first announced plans to implement this “administrative PAYGO” process in February 2005, shortly after President Bush was inaugurated for his second term.⁵ Specifically, the Administration said OMB planned to establish an “internal review process that requires agencies, when proposing substantial administrative decisions that increase mandatory spending, to also propose other offsetting administrative decisions that reduce mandatory spending.” This approach, the Bush Administration said, would accompany an Administration legislative proposal to restore some aspects of a statutory budget enforcement process often referred to as “pay-as-you-go” (PAYGO). **Box 1** discusses “statutory PAYGO,” which is different from the OMB process in several significant respects, including stages of the budget process in which activities occur, the actors who are involved, and transparency to Congress and the public.⁶

Box 1: Juxtaposition with “Statutory PAYGO”

In using the term “PAYGO,” the Bush Administration juxtaposed the planned OMB “internal review process” with a different, statutory budget enforcement mechanism that previously had been in effect from 1991 through 2002. The latter process—generally referred to as “pay-as-you-go” (PAYGO)—was established by the Budget Enforcement Act of 1990 (BEA; P.L. 101-508; 104 Stat. 1388-573), after negotiations between Congress and President George H.W. Bush. The statutory PAYGO process played a significant role in enforcing budget policies, specifically with respect to the consideration of revenue and mandatory spending legislation. As enacted, the BEA imposed a deficit neutrality requirement on mandatory spending and revenue legislation. Enacted legislation providing for new mandatory spending or decreasing revenues for a fiscal year could not result in a net cost for that year. (OMB would track these estimates on what some observers colloquially would call a “scorecard.”) Otherwise, the law would require the President to issue a sequestration order to remedy the violation through automatic, across-the-board spending reductions in non-exempt mandatory programs. The statutory PAYGO process generally was intended to preserve deficit reduction by keeping a deficit from being increased or surplus from being decreased. The process was transparent to Congress and the public through extensive and prompt reporting (104 Stat. 1388-586).

These statutory PAYGO procedures did not apply to discretionary spending, which was subject to separate budget enforcement procedures. In addition, statutory PAYGO dealt only with the budgetary impact of legislation considered by Congress. It was not intended to address changes in the level of mandatory spending and revenue that might occur under current law (e.g., due to changes in the economy, demographic trends, or agencies' use of discretion in conformance with congressional intent and expectations). The statutory PAYGO process was extended twice and effectively was terminated in 2002 (P.L. 107-312). The George W. Bush Administration later submitted draft legislation to Congress that would have restored a PAYGO process, albeit for mandatory spending legislation only. That is, under the Administration's proposal, legislation that would reduce revenues would not have been subject to PAYGO requirements, and revenue increases could not have been used to offset mandatory spending increases. A new, comprehensive version of statutory PAYGO (i.e., addressing both mandatory spending and revenue legislation) was enacted in 2010, as Title I of P.L. 111-139, with no expiration date.

⁵ See OMB, *Budget of the U.S. Government, Fiscal Year 2006* (Washington: GPO, 2005), p. 27.

⁶ **Box 1** draws on CRS Report R41005, *The Statutory PAYGO Process for Budget Enforcement: 1991-2002*, by Robert Keith, and CRS Report R41157, *The Statutory Pay-As-You-Go Act of 2010: Summary and Legislative History*, by Robert Keith.

Due to the differences, a lack of information about how the OMB process has been used in practice, and absence of the term “administrative PAYGO” in the underlying OMB memorandum, this CRS report generally refers to “the OMB May 2005 memorandum” or “the OMB process” instead of “administrative PAYGO.”

OMB May 2005 Memorandum

On May 23, 2005, then-OMB Director Bolten followed up on OMB’s announcement by issuing a two-page memorandum to heads of departments and agencies with directions for agencies (see **Appendix A**). As of this CRS report’s writing, the memorandum remains virtually the only published source of transparency into OMB’s process. With a stated goal of “restraining Federal spending growth,” Director Bolten wrote that effective immediately, agencies were required to follow certain steps regarding “administrative actions” that would “increase mandatory spending.”⁷ The memorandum further explained and defined the latter two quoted terms.

Definitions of *Administrative Actions* and *Increase in Mandatory Spending*

With regard to the term “administrative actions,” the memorandum identified two types of administrative actions that could have the impact of increasing mandatory spending: those actions that are “required by law” and those that are “discretionary.” The memorandum defined the second type, “discretionary administrative actions,” as including “regulations, demonstrations, program notices, guidance to states or contractors, or other similar actions not required by law that would increase mandatory spending.”⁸ Notably, the memorandum also stated that “the term ‘administrative action’ includes actions not normally subject to OMB review,”⁹ suggesting that this process would systematically involve OMB in agencies’ decision making in new ways.

The memorandum also defined “increase in mandatory spending,” as “an increase relative to the projection in the most recent [President’s annual budget request] or Mid-Session Review of what is required, under current law, to fund the mandatory-spending program.”¹⁰ In OMB documents, these projections are called “current services estimates” or “baseline projections of current policy,”¹¹ and are based on the Administration’s economic and programmatic assumptions.

Agency Submission of Administrative Actions to OMB

Procedurally, the memorandum required agencies to include in their annual budget requests to OMB a list of “all administrative actions planned or anticipated for the fiscal year covered by the submission that would increase mandatory spending in that or any subsequent fiscal year.”¹²

⁷ OMB, memorandum from Joshua B. Bolten, Director of OMB, to heads of departments and agencies, “Budget Discipline for Agency Administrative Actions,” M-05-13, May 23, 2005, p. 1.

⁸ Ibid, p. 1, paragraph enumerated as “3.” The memorandum said questions of what would constitute a “similar action” would be resolved by the OMB Director “at his discretion” (ibid, p. 2, paragraph “3.”).

⁹ Ibid, pp. 1-2, paragraph “3.”

¹⁰ Ibid, p. 1. OMB submits the Mid-Session Review to Congress on behalf of the President in compliance with 31 U.S.C. § 1106, which requires a supplemental update to the President’s annual budget proposal “before July 16.”

¹¹ For example, see OMB, *Budget of the U.S. Government, Fiscal Year 2011, Analytical Perspectives* (Washington: GPO, 2010) (hereafter *FY2011 Analytical Perspectives*), pp. 393-415.

¹² OMB, memorandum from Joshua B. Bolten, Director of OMB, to heads of departments and agencies, “Budget Discipline for Agency Administrative Actions,” M-05-13, May 23, 2005, p. 1, paragraph “2.” These submissions are required for most executive agencies by law (31 U.S.C. § 1108) and typically occur in September. They are used to construct the President’s budget, which is required to be submitted to Congress early in the next calendar year (31

OMB did not address whether these “planned or anticipated” actions similarly would appear in the President’s budget submission to Congress or in agencies’ more detailed budget submissions. At any point in time between one year’s annual budget submission to OMB and the next, the memorandum furthermore required agencies to “advise OMB of any anticipated administrative action that would increase mandatory spending as soon as possible after the agency becomes aware that the action is likely to occur.”¹³ Each of these notification requirements appeared to hold regardless of whether the “planned” or “anticipated” administrative actions were considered to be required by law or subject to an agency’s discretion. Other language in the memorandum suggested that OMB would treat all such “planned” and “anticipated” administrative actions as having been “proposed” by the agency to OMB.¹⁴

OMB provided further direction on how agencies should make these “proposals.” If an agency submitted to OMB a discretionary administrative action that would increase mandatory spending, OMB said the agency also would be required to “include one or more proposals for other administrative actions ... that would comparably reduce mandatory spending.”¹⁵ Requests for exceptions to the requirement for offsets would need to come from the agency head, and such requests would be “granted” by the OMB Director only “in light of extraordinary need or other compelling circumstances.”¹⁶ An agency head would be allowed to “appeal” to the “Budget Review Board.”¹⁷ Alternatively, if an agency determined that an action would increase mandatory spending but is “required by law and therefore does not permit the exercise of discretion,” OMB directed that “the agency’s general counsel must provide an opinion explaining that conclusion.”¹⁸ In either case, OMB directed that “[a]ll materials submitted to OMB in this context should include a first-year cost estimate and, whenever possible, five- and ten-year cost estimates provided by the agency’s chief actuary or, in the absence of an actuary, the chief budget or policy officer.”¹⁹

OMB Responses to Agency Submissions

The memorandum also discussed what might happen after an agency submits these planned and anticipated actions to OMB. In some cases, if OMB were to determine that an offset is “inappropriate,” the memorandum said OMB may “request” that the agency submit “alternative offsets.”²⁰ Alternatively, if an agency were to submit a discretionary administrative action without

U.S.C. § 1105).

¹³ OMB, memorandum from Joshua B. Bolten, Director of OMB, to heads of departments and agencies, “Budget Discipline for Agency Administrative Actions,” M-05-13, May 23, 2005, p. 1, paragraph “2.”

¹⁴ In the memorandum, some language referred to “discretionary” administrative actions as having been “proposed” (ibid, p. 1, paragraph “1.”). Other language referred to administrative actions that are “required by law” as having been “proposed,” as well (ibid, p. 2, paragraph “3.”).

¹⁵ Ibid, p. 1, paragraph “1.”

¹⁶ Ibid, p. 2, paragraph “6.”

¹⁷ Ibid. In the Bush Administration, the Budget Review Board was established to consider appeals by agencies during formulation of the President’s budget proposals. Its members included the OMB Director, Treasury Secretary, and Vice President. The process for handling such appeals tends to differ from President to President.

¹⁸ Ibid, p. 2, paragraph “3.” An OMB representative interpreted this direction as not specifying the time frame in which the opinion would need to be provided (telephone conversation with official from OMB’s Office of General Counsel, June 24, 2010).

¹⁹ Ibid, p. 2, paragraph “4.”

²⁰ Ibid, p. 2, paragraph “5.”

an offset, it would be “returned to the agency for reconsideration.”²¹ The latter language is identical to what OMB’s Office of Information and Regulatory Affairs (OIRA) uses in the context of reviewing agencies’ draft proposed and final rules. When OMB reviews rules, OMB says a return for reconsideration may occur for a variety of reasons, including, among others, “if the quality of the agency’s analyses is inadequate ... [and] if the rule is not consistent with ... the President’s policies and priorities.”²² During the Bush Administration, an OIRA Administrator referred to return letters as being OMB’s “ultimate weapon” in influencing agencies’ actions.²³ (See **Box 2** for discussion of OMB returns of draft rules for agency reconsideration, which may inform assessments of the potential effect of returns under OMB’s May 2005 memorandum.²⁴)

Box 2. OMB Returns of Draft Rules to Agencies for Reconsideration

Executive Order (E.O.) 12866 established a framework for presidential review of agency rulemaking and specified OIRA’s process for reviewing certain draft rules.²⁵ The E.O. also addressed the possibility of OIRA returning rules to agencies for reconsideration. Presidential review of rulemaking at times has sparked controversy in terms of its impact in specific policy areas; concerns about the prerogatives and roles of Congress, the President, and administrative agencies; and concerns about transparency of agency decision making. In some respects, E.O. 12866 indicates an expansive view of presidential authority to control agency rulemaking, which various observers have viewed positively and negatively. The E.O. does not authorize OIRA to “approve” or “disapprove” a draft rule. Rather, if statutory authority to promulgate rules is vested in an agency, as opposed to OMB or the President, it is up to the agency to decide whether to proceed with publication of a rule after it has been returned, or to accept OIRA’s “suggestions.” Nevertheless, agencies very rarely publish OIRA-returned rules or ignore substantive OIRA suggestions. Section 8 of the E.O. says that if OIRA returns a regulatory action to an agency for further consideration, the agency shall not issue the corresponding regulatory action, except to the extent doing so is required by law. However, the same section also says if an agency wants to issue a regulatory action in spite of an OIRA return, the agency head “may request Presidential consideration,” as provided in Section 7 of the order. Section 7 says that if disagreements between agencies or between OMB and an agency cannot be resolved by OIRA (e.g., regarding how and whether to issue a regulatory action), then “[t]o the extent permitted by law,” the conflict is to be resolved by “the President, or by the Vice President acting at the request of the President, with the relevant agency head,” and ultimately that “the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President’s decision with respect to the matter.” As discussed in a CRS report, E.O. 12866 “mitigates the potential controversy that this type of presidential displacement of agency authority could generate by providing that this authority is to be exercised ‘only to the extent permitted by law,’ thereby giving an agency head the opportunity to argue in a given case that the President could only issue an advisory opinion, but it seems that the potential implication of this provision is that the President is perceived as having determinative authority in this context.”²⁶

²¹ Ibid, p. 1, paragraph “1.”

²² OMB adds that “[s]uch a return does not necessarily imply that either OIRA or OMB is opposed to the draft rule,” and that “a return letter explains why OIRA believes that the rulemaking would benefit from further consideration by the agency.” See “OIRA Return Letters,” at <http://www.reginfo.gov/public/do/eoReturnLetters>.

²³ OMB, OIRA Administrator John D. Graham, Ph.D., “Stimulating Smarter Regulation: OMB’s Role,” remarks prepared for the American Hospital Association, July 17, 2002, at http://www.whitehouse.gov/omb/inforeg_graham_ama071702/.

²⁴ **Box 2** draws from CRS Report RL32855, *Presidential Review of Agency Rulemaking*, by T. J. Halstead, and CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, by Curtis W. Copeland.

²⁵ 58 *Federal Register* 51735 (October 4, 1993).

²⁶ CRS Report RL32855, *Presidential Review of Agency Rulemaking*, by T. J. Halstead.

Subsequent Public Announcements

After issuing the memorandum, OMB briefly cited it and some of its requirements in *Circular No. A-11*, an annual document that directs agencies in how to prepare budget requests.²⁷ The Bush Administration also included short descriptions of the memorandum's controls in subsequent presidential budget requests, which said the OMB memorandum continued to be in effect.²⁸ During the remainder of the Bush Administration, it seems that no further information about the OMB memorandum and its utilization was publicly released.

Shortly after President Obama took office in January 2009, the Obama Administration indicated it would continue to implement the OMB memorandum's procedures in some form. After a March 2009 hearing, Ranking Member Paul Ryan of the House Budget Committee posed several questions for the record to OMB Director Peter R. Orszag about the OMB May 2005 memorandum. Specifically, he asked if the Obama Administration was continuing to use the memorandum's process; if the Administration had made any related changes to its baseline; what any such baseline changes and their budgetary impacts were; and for an "account of all administrative actions affecting levels of mandatory spending that have been implemented since January 20, 2009, or which are assumed in your budget."²⁹ Director Orszag responded that the Obama Administration supported continuation of the OMB process and furthermore that it planned to implement it relative to the current services baseline in the President's FY2010 budget proposal, "except where it is appropriate to waive Administrative PAYGO in accordance with established procedures."³⁰

In addition, Director Orszag said the upcoming FY2010 *Analytical Perspectives* volume of the President's budget proposal would "provide information on the budgetary impact of regulations and other important baseline assumptions." In this response, Director Orszag referred to a section of the *Analytical Perspectives* volume that identifies "some," but not all, of the "major programmatic assumptions" that may affect the Administration's baseline estimates.³¹ Conceivably, such a list might include some, but not necessarily all, of any planned changes in mandatory spending that result from the OMB May 2005 memorandum's process.³² However, without greater transparency into OMB's and agencies' activities, it is not clear these instances could be identified.

²⁷ OMB, *Circular No. A-11*, "Preparation, Submission, and Execution of the Budget" (hereafter, *Circular A-11*), June 2005, Section 25, p. 4, and Section 31, p. 1. For the current version, see OMB, *Circular A-11*, July 2010, Section 25, p. 4, and Section 31, p. 2, at http://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc/.

²⁸ OMB, *FY2007 Analytical Perspectives*, p. 212; *FY2008 Analytical Perspectives*, p. 212; and *FY2009 Analytical Perspectives*, p. 216.

²⁹ U.S. Congress, House Committee on the Budget, *The President's Fiscal Year 2010 Budget*, hearing, 111th Cong., 1st sess., March 3, 2009, H.Hrg. 111-4 (Washington: GPO, 2009), p. 79.

³⁰ Ibid.

³¹ For the relevant section in the President's FY2011 budget proposal, see OMB, *FY2011 Analytical Perspectives*, pp. 398-410. The volume said these "major programmatic assumptions" include assumptions about annual cost-of-living adjustments in indexed programs; the number of beneficiaries receiving payments; the continuation of expiring programs and provisions; the timing and substance of regulations that will be issued over the projection period; the use of "administrative discretion" provided under current law; and "other assumptions about the way programs operate." However, OMB said the *Analytical Perspectives* listing is "not intended to be ... exhaustive" and that "the variety and complexity of Government programs are too great to provide a complete list. Instead, some of the more important assumptions are shown" (ibid, p. 398).

³² In practice, a large array of documents and decisions that influence the level and composition of mandatory spending are not included in these assumptions, including program notices, guidance documents, and letters.

After the March 2009 hearing, little information about the OMB memorandum and its utilization was forthcoming. Following the Bush Administration's practice, the Obama Administration referred to the OMB memorandum in the annual *Analytical Perspectives* volume, indicating the Administration would continue to implement its process.³³

Further Information from OMB

An OMB representative provided some information about the May 2005 memorandum and its process in response to inquiries from CRS.³⁴ According to the representative, similar activities had occurred before, but the May 2005 memorandum formalized them. Within OMB, the process is implemented in a decentralized way by the organization's Resource Management Offices (RMOs).³⁵ The representative also said information about the process's scope and effect has not been made publicly available. Such proceedings and communications are considered by OMB to be pre-decisional and subject to restrictions outlined in Section 22 of *Circular A-11*.³⁶ This section of the circular says, among other things, that "[p]olicy consistency between the President's Budget and the budget-related materials prepared for the Congress and the media is essential," and it points to a statutory provision that restricts agency officers and employees from submitting "to Congress or a committee of Congress an appropriations estimate or request, a request for an increase in that estimate or request, or a recommendation on meeting the financial needs of the Government" unless "requested by either House of Congress."³⁷ As noted later in this report, Congress has legislated multiple exceptions to the statutory restriction.

Analysis of Potential Effects and Implications

As of the time of this report's writing, little more is publicly known about how widely the OMB memorandum has been used, whether it has been used consistently across agencies and policy areas, and what its effects have been. In addition, the Bush and Obama Administrations generally have not addressed whether agencies' and OMB's actions would be consonant with congressional intent or expectations. Even with a lack of transparency, it is nevertheless possible to analyze some of the memorandum's potential effects and implications, if the memorandum's process were used. Such analyses, may, in turn, highlight potential issues for Congress. In one case, an agency official broached the subject in a congressional hearing, as discussed below.

Example of OMB's Controls: Conservation Reserve Program (CRP)

OMB's controls on mandatory spending programs appear to have been used during implementation of the Conservation Reserve Program (CRP) in the U.S. Department of Agriculture (USDA). The CRP provides payments to farmers to take highly erodible or environmentally sensitive cropland out of production for ten or more years. CRP is the federal government's largest private land retirement program and was enacted in 1985. The 2008 farm

³³ OMB, *FY2010 Analytical Perspectives*, p. 215; and *FY2011 Analytical Perspectives*, p. 144.

³⁴ Telephone conversation with representative from OMB's Office of General Counsel, June 24, 2010.

³⁵ Each RMO focuses on a cluster of related agencies and issues (for example, natural resources) to examine budget requests and make funding recommendations. For more on OMB's organization, see CRS Report RS21665, *Office of Management and Budget (OMB): A Brief Overview*, by Clinton T. Brass.

³⁶ OMB, *Circular A-11*, August 2009, Section 22 ("Communications with the Congress and the Public and Clearance Requirements").

³⁷ *Ibid*, Sections 22.2 and 22.3, pp. 1-2, citing 31 U.S.C. § 1108(e).

bill allows USDA to enroll up to 32 million acres at any one time,³⁸ with mandatory funding coming from USDA's Commodity Credit Corporation (CCC).³⁹ Jurisdiction in Congress for CRP (for both authorization and funding since CRP is a mandatory program) resides in the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition and Forestry.

Congress may have the understanding that it has given USDA statutory authority and access to mandatory funding to enroll 32 million acres, as well as the expectation the authority would be used. However, the process outlined in OMB's May 2005 memorandum appears to have prevented USDA from reaching that goal, at least for a time. In testimony to Congress in June 2010, a USDA official acknowledged several obstacles that were imposed on agency action by OMB's process. Specifically, the testimony tied the Bush Administration's application of the OMB process to agency actions concerning the CRP. The testimony also cited a more recent application of OMB's process, in which spending reductions from changes to the federal crop insurance program apparently were used as offsets to enable CRP funding.

But [the current treatment of offsets to expand the Conservation Reserve Program] isn't the sole source of the problem that we confront both in dealing with the Administration PAYGO problems that we face day or day [sic] or the ones that Congress faces. Basically we have ended up in a situation where even going back to the previous Administration there were efforts to make modifications to the CRP program that required offsets, and there were a number of tradeoffs that were made in terms of efforts to pay for programs. The previous Administration wanted an open access initiative applied to CRP... They were required to pay for that and so in order to pay for it, they modified their assumptions concerning CRP participation... They didn't implement the program, and during the transition [to the Obama Administration] OMB applied those PAYGO savings to deficit reduction and so we lost it. When we then decided to try to find a way to allow for an extension of expiring CRP contracts last year, we had to pay for it, and so we went back and made an assumption about future CRP signup in order to get the money to pay for the extensions last year. So that meant as we start looking at an open signup this year with the goal to maximizing CRP participation at [32 million acres], we are basically stuck with an offset... About \$300 million of administratively required PAYGO offsets.⁴⁰

To put the testimony in context, fewer than 32 million acres are enrolled in CRP, and the USDA baseline reflected only the enrolled acres. Thus, apparently the USDA baseline did not contain sufficient funding to enroll the additional acres to reach 32 million acres, even though USDA has the legislative authority up to 32 million acres. CRP program activity essentially appears to have been limited by the Administration's baseline under OMB's controls.

Table 1 shows that USDA's baseline in February 2010 assumes that 30 million acres will be enrolled in CRP from 2011 to 2014. Conversely, CBO's concurrent baseline in March 2010 assumes nearly full enrollment during those same years, at 31.8 to 31.9 million acres. During the 2011-2014 period, the difference between CBO's and USDA's baseline assumptions ranges from

³⁸ P.L. 110-246, Section 2103 (16 U.S.C. § 3831(d)): "During fiscal years 2010, 2011, and 2012, the Secretary may maintain up to 32,000,000 acres in the conservation reserve at any 1 time."

³⁹ 16 U.S.C. § 3841(a): "The Secretary shall use the funds, facilities, and authorities of the Commodity Credit Corporation to carry out the following programs... the conservation reserve program." The CCC is the payment mechanism for the farm commodity programs and several other mandatory agricultural programs such as the CRP. CCC can borrow up to \$30 billion at any one time from the U.S. Treasury to make mandatory payments (15 U.S.C. § 714 et seq.). It reimburses the Treasury with appropriations from the annual Agriculture appropriations bill to restore its borrowing authority.

⁴⁰ U.S. Congress, House Committee on Agriculture, "Hearing to Review U.S. Farm Safety Net Programs in Advance of the 2012 Farm Bill," June 17, 2010, at <http://agriculture.house.gov/hearings/statements.html>. Unofficial transcript of testimony by James Miller, USDA Under Secretary for Farm and Foreign Agricultural Services, provided to CRS by the committee on June 18, 2010.

1.5 million acres to 1.9 million acres, with USDA assuming lower enrollment (and thus lower outlays). This difference gives rise to tension between Congress and USDA/OMB over whether additional CRP enrollment to reach the 32 million acre cap should be required to be offset.

Table 1. Differences in CRP Acreage Enrollments in CBO and USDA Baselines
(million acres)

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
CBO March 2010 baseline	31.7	31.8	31.8	31.9	31.9	31.9	31.9	31.8	31.9	31.9
USDA February 2010 baseline	31.4	30.2	30.0	30.0	30.4	31.2	31.8	31.9	31.9	31.9
Difference	0.3	1.6	1.8	1.9	1.5	0.7	0.1	-0.1	0.0	0.0

Source: CRS, compiled from Congressional Budget Office March 2010 baseline for CRP (unpublished), and USDA Office of the Chief Economist, "USDA Agricultural Projections to 2019," OCE-2010-1, February 2010, p. 67, at <http://www.ers.usda.gov/Publications/OCE101/OCE101.pdf>.

The process outlined by OMB's May 2005 memorandum appears to have required USDA to find offsets in other mandatory programs when it wanted to increase CRP acres—an activity that would cost more but which Congress already had authorized USDA to do, both in statute and for which CBO has projected outlays in its baseline. Likewise, if USDA wished to use its authority to implement administrative initiatives that are within the scope of the CRP authorizing language provided by Congress (such as the Open Access program or programs to help certain species such as the sage grouse), OMB's process would appear to require USDA to find offsets before funding became available to implement those actions.

The effect of OMB's process on CRP appears to have become an issue during the Bush Administration, as implied in the testimony excerpted above. According to the USDA testimony, the Bush Administration wished to fund an Open Access initiative. In order to fund the initiative under OMB's process, the Administration modified its assumptions concerning CRP participation in a way that reduced costs and freed up funds. However, the Open Access initiative ended up not being implemented, leaving the freed-up funds still to be utilized. During the presidential transition, however, OMB allocated the freed-up funds to deficit reduction rather than other purposes, such as CRP. During the Obama Administration, according to the testimony, offsets were needed again when USDA wanted to increase CRP enrollment. This came to light in a more transparent way during the recent renegotiation of the Standard Reinsurance Agreement (SRA) for the federal crop insurance program.⁴¹ A USDA press release that announced the final SRA agreement states that

[T]he Administration is also ensuring that \$2 billion in savings from the new Standard Reinsurance Agreement will be used to strengthen successful, targeted risk management and conservation programs and that \$4 billion will be used to reduce the national deficit. The \$2 billion that will be invested in Farm Bill programs include releasing approved risk management products, such as the expansion of the Pasture, Rangeland, and Forage

⁴¹ USDA periodically negotiates an SRA with private crop insurance companies, something USDA can do administratively within the scope of the authorizing legislation. The new SRA negotiation reduces various payments to crop insurance companies for delivering the program to farmers. The final agreement announced in June 2010 was estimated by USDA to reduce crop insurance outlays by \$6 billion over 10 years. For more background on the SRA, see CRS Report R40966, *Renegotiation of the Standard Reinsurance Agreement (SRA) for Federal Crop Insurance*, by Dennis A. Shields.

program [a crop insurance program]; providing a performance discount or refund, which will reduce the cost of crop insurance for certain producers; increasing Conservation Reserve Program (CRP) acreage to the maximum authorized level; investing in new and amended Conservation Reserve Enhancement Program initiatives; and investing in CRP monitoring.⁴²

These are activities for which Congress appears to have had the understanding it had already provided funding to USDA (indicated by CBO's baseline assumptions shown in **Table 1**, through the statutory instructions to use the Commodity Credit Corporation to pay for CRP, and the authorities for the Federal Crop Insurance Corporation). The perceived need for offsets appeared to come from within the Bush and Obama Administrations, and particularly from OMB, as indicated in the testimony above.

As a result, an agricultural newsletter reported that the House Agriculture Committee was interested in OMB's process and might call a hearing.⁴³ The newsletter also quoted the committee's Chairman Collin C. Peterson as saying,

[W]ait a minute. We have already authorized the CRP at 32 million acres. But it turns out that OMB had already capped CRP at a lower level and used part of the money for the Open Access program. OMB is not supposed to do that. They are undermining the authority of the authorizing committees.⁴⁴

USDA reportedly said that it would cooperate by providing information to Congress.

As for whether there could be a pattern of OMB redirecting funds in past years, [USDA Secretary Tom] Vilsack said that "Honestly, I don't know enough about the details of OMB's machinations. I just know that I am focused on trying to get those 32 million acres in CRP, which I think we are going to get done. We will cooperate with the committee and we will provide them with all the information that they are seeking."⁴⁵

The effect of budgetary offsets created by the Administration and used in the OMB process may also affect the official CBO baseline used by Congress. For example, the offset used to increase CRP that was cited in the USDA press release above was savings from the renegotiation of the Standard Reinsurance Agreement for crop insurance. In the spring of 2010, on the expectation that USDA would adopt some savings administratively through the SRA, the March 2010 CBO baseline—released before the final SRA agreement was reached in June 2010—reflected a reduction by incorporating a placeholder of \$3.9 billion of savings from the SRA. A future CBO baseline is expected to fully incorporate the final SRA under CBO assumptions, which might result in a different amount than USDA's estimate of \$6 billion of savings. Moreover, the Administration's assertion that it is "reinvesting" \$2 billion from the SRA savings into the farm bill baseline for CRP and other crop insurance programs may or may not be fully reflected in CBO's baseline, again depending on the potential for different budgetary assumptions used for OMB's process and CBO's official baseline.

⁴² U.S. Department of Agriculture, "USDA Releases Final Draft Crop Insurance Agreement Which Improves Risk Management Tools for America's Farmers and Ranchers, Ensures Program Sustainability, Generates \$6 Billion in Savings: \$4 Billion for Deficit Reduction, \$2 Billion for Critical Farm Bill Programs While Improving Critical Farm Safety Net Program," press release, June 10, 2010, at <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2010/06/0316.xml>.

⁴³ Sara Wyant, "Agriculture Committee Giveth and OMB Taketh Away," Agri-Pulse Communications, July 14, 2010, at http://www.agri-pulse.com/20100714S_Ag_Committee_OMB_taketh.asp.

⁴⁴ Ibid.

⁴⁵ Jon H. Harsch, "USDA Will Support Probe of Possible Improper OMB Diversion of USDA Funds," Agri-Pulse Communications, July 14, 2010, at http://www.agri-pulse.com/20100714H1_Vilsack_on_USDA_Funds.asp.

Thus, some Members of Congress, especially those on the Agriculture committees, have expressed concern that USDA has taken action that will reduce the funds available to Congress to write the next farm bill in 2012.⁴⁶ Less may be available either because OMB applies administrative savings to deficit reduction, or CBO's assumptions do not reflect the same increase in the baseline as the Administration asserts was added to the programs through OMB's process. These Members expressed concerns about preserving the CBO baseline, so that Congress can make decisions of how to reallocate funds within the agricultural budget, or comply with possible congressional directives to reduce the deficit via budget reconciliation. In both of these cases, the Agriculture committees could make similar reductions to crop insurance, but the difference is that the savings could be available for legislative offsets through statutory PAYGO, rather than be used as offsets for an OMB process that some in Congress might question.

Other Potential Effects and Implications⁴⁷

The CRP example illustrates one instance in which OMB appeared to exercise influence over an agency's mandatory spending program. However, without more information about when and how this process has been implemented, it is not possible to say whether the example is typical. Furthermore, as noted earlier, OMB told CRS that the process outlined in OMB's May 2005 memorandum has not been implemented in a centralized manner.⁴⁸ Therefore, it is possible the process may have been implemented inconsistently across OMB's Resource Management Offices and, as a result, in different ways across agencies and programs. Given the lack of transparency surrounding this process, it is not possible to determine the extent to which the process has been used or enforced, nor is it possible to determine whether or not the process has achieved its stated purpose of containing increases in mandatory spending from discretionary administrative actions.

Nevertheless, the CRP example does highlight some potential broader implications of this OMB process. For one thing, it suggests that the OMB process may have measurable effects on program outputs and outcomes. In the case of CRP, this process appears to have affected the number of acres that were enrolled in the program. By extension, such a process also could affect the number of individuals enrolled in benefits programs, like Medicaid or Supplemental Security Income (SSI), and the services they receive. In addition, there may be instances in which this process may impose administrative burdens on federal agencies. When agencies "propose" an administrative action for OMB's review, staff in program offices, budget or actuarial offices, and general counsel offices must develop five- and ten-year cost (or savings) estimates, as appropriate, and determine whether or not the action is required by law (or discretionary). If agencies are engaging in such activities for every discretionary action that technically is covered under the OMB memorandum's definitions—that is, every program notice, every piece of

⁴⁶ In the House: U.S. Congress, House Committee on Agriculture, "Hearing to Review U.S. Farm Safety Net Programs in Advance of the 2012 Farm Bill," June 17, 2010, at <http://agriculture.house.gov/hearings/statements.html>. Transcript of statement by Representative Jerry Moran, provided to CRS by the committee on June 18, 2010: "Everything that I have been able to understand about this topic is that we will get no credit in the CBO baseline for the money that is placed into CRP and no credit for the money that is placed into expanding programs related to crop insurance... I think that the baseline is going to be deteriorated as a result of this SRA agreement coming to a conclusion." In the Senate: Senate Committee on Agriculture, Nutrition and Forestry, "Lincoln, Chambliss Urge USDA to Modify Crop Insurance Proposal," press release, July 7, 2010, at <http://ag.senate.gov/site/news.html>: "[W]e remain concerned that the \$6 billion in proposed cuts over the next ten years to the program reflected in the third draft of the SRA will severely constrain the CBO baseline for the farm bill. Although no doubt your plan to utilize a portion of the savings to expand certain crop insurance coverage and enrollment of acres into the Conservation Reserve Program and Conservation Reserve Enhancement Program is intended to respond to concerns about reductions to the farm bill baseline, it is unclear what the exact impact will be on the baseline."

⁴⁷ Karen E. Lynch, Analyst in Social Policy, wrote this section.

⁴⁸ See this report's section titled "Further Information from OMB".

guidance to states or contractors, etc.—this could result in an increase in the workload of relevant staff and result in less effort focused on other tasks. Moreover, if agencies experience difficulty in identifying plausible offsets, it is conceivable that their behavior may be altered. For example, agencies may choose to not consider, pursue, or submit to OMB an administrative action that would cost money, regardless of the agency’s perception of a policy’s merits or whether it would be consistent with congressional intent. Because OMB’s process is not transparent outside the executive branch, agencies might furthermore be hesitant to discuss such policy options and trade-offs with congressional authorizing committees.

Potential Issues and Options for Congress

OMB’s effort to exercise more systematic control over agency mandatory spending is fairly recent, but many related issues have arisen in the past. The Framers of the Constitution intended for Congress, the President, and the courts to share power over the national government, subject to checks and balances from each other. Consequently, as Congress and the President pursue their policy preferences, they may cooperate or compete for control of agencies and the policies they implement. In addition, with the advent of the “administrative state”—that is, expansion in the size and scope of federal government at the turn of the 20th century—Congress granted increasing discretion in many policy areas to administrative agencies.⁴⁹ In response, Congress has shown ongoing interest in monitoring, regulating, and publicizing how agencies use discretion.⁵⁰ The institutional presidency also expanded in the 20th century in several respects, especially with the establishment of OMB and its growing role in helping the President to pursue his or her policy preferences.⁵¹ Consequently, Congress also has shown considerable interest in the possibility of presidential influence on, and interventions in, agency decision making through OMB.⁵²

Prior Congressional Approaches to Similar Issues of Agency Discretion and OMB Involvement

In **Appendix C**, this report reviews selected instances when these issues arose and ways in which Congress responded. These include the Administrative Procedure Act (APA), which Congress passed in 1946 in order to bring transparency and public participation to agencies’ use of discretion through rulemaking.⁵³ The APA facilitated congressional oversight by defining certain kinds of discretionary actions as “rules,” requiring agencies to formally articulate proposed rulemakings in advance of implementation, and allowing interested stakeholders to act as

⁴⁹ See Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge, UK: Cambridge University Press, 1982); and David H. Rosenbloom, *Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946-1999* (Tuscaloosa, AL: University of Alabama Press, 2000).

⁵⁰ See *ibid.*; CRS Report RL30795, *General Management Laws: A Compendium*, by Clinton T. Brass et al.; and CRS Report RL30240, *Congressional Oversight Manual*, by Frederick M. Kaiser et al.

⁵¹ See Matthew J. Dickinson and Andrew Rudalevige, “Presidents, Responsiveness, and Competence: Revisiting the ‘Golden Age’ at the Bureau of the Budget,” *Political Science Quarterly*, vo. 119 (Winter 2004/2005), pp. 633-654; and U.S. Congress, Senate Committee on Governmental Affairs, *Office of Management and Budget: Evolving Roles and Future Issues*, committee print, prepared for the Senate Committee on Governmental Affairs by the Congressional Research Service, 99th Cong., 2nd sess., S.Prt. 99-134 (Washington: GPO, 1986).

⁵² *Ibid.*

⁵³ P.L. 404, 79th Cong.; 60 Stat. 237; 5 U.S.C. § 551 et seq.

extensions of Congress for purposes of “fire-alarm” oversight.⁵⁴ This transparency also facilitated Congress’s ability to influence rulemaking through the use of appropriations restrictions.⁵⁵ It should be noted, however, that rules may encompass only a small portion of the discretion that agencies exercise. A prominent administrative law scholar argued that most agency decision making is informal activity—that is, use of discretion not covered by the APA and largely unregulated.⁵⁶

Furthermore, OMB sometimes has been involved in agency decision making, as discussed in **Appendix C**. In some instances, Congress gave OMB a role in agency decision making through statutory requirements, when doing so served Congress’s legislative purposes. At other times, various Presidents initiated OMB’s involvement in order to pursue their policy preferences. In both cases, Congress responded to the prospect or reality of OMB’s involvement with statutory directions, constraints, and transparency requirements. In other cases, OMB itself has provided for some level of transparency. If Congress wishes to consider options related to the OMB May 2005 memorandum, the following four examples of OMB involvement in agency decision making, along with related congressional responses, may suggest approaches.

- **Agency submissions of budget information and requests.** The Budget and Accounting Act of 1921 required agencies to submit budget requests to the President for potential modification, before the requests are submitted to Congress.⁵⁷ OMB administers this process on the President’s behalf. In multiple cases, Congress has legislated statutory exceptions to this law and thereby allowed direct submissions of budget information to Congress, in order to provide agencies with some independence from the policy preferences of the President or to improve congressional access to agency information.
- **OMB clearance of agency testimony and draft legislation.** Executive Order (E.O.) 8248 established a process for OMB to “clear” and “coordinate” numerous types of agency communications with Congress, including testimony and correspondence, before agencies submit them to Congress.⁵⁸ In this area, as well, Congress has acted to provide some agencies with statutory authority to directly submit such materials to Congress, in order to provide them with some independence from the policy preferences of the President or to improve congressional access to agency information.
- **OMB and the Paperwork Reduction Act.** Congress passed the Paperwork Reduction Act to provide central leadership and oversight of government-wide efforts to reduce paperwork burden on non-federal persons.⁵⁹ The law established the Office of Information and Regulatory Affairs (OIRA) within OMB. OIRA is

⁵⁴ As formulated in a classic article, “fire-alarm” oversight refers to “rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative decisions (sometimes in prospect), to charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts and Congress itself.” See Mathew D. McCubbins and Thomas Schwartz, “Congressional Oversight Overlooked: Police Patrols versus Fire Alarms,” *American Journal of Political Science*, vol. 28, February 1984, p. 186.

⁵⁵ CRS Report RL34354, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions*, by Curtis W. Copeland.

⁵⁶ Kenneth Culp Davis, *Administrative Law Treatise*, 2nd ed., vol. 1 (San Diego, CA: K.C. Davis, 1978), p. 14.

⁵⁷ P.L. 13, 67th Congress, now codified at 31 U.S.C. § 1105.

⁵⁸ E.O. 8248, “Establishing the Divisions of the Executive Office of the President and Defining Their Functions and Duties,” 3 C.F.R. 1938-1943 Comp., p. 576, as amended by E.O. 12608.

⁵⁹ P.L. 104-13; 109 Stat. 163.

authorized by law to approve or disapprove agency information collection requests, but this approval process is subject to certain requirements for transparency and public participation.

- **OMB review of agency rules and guidance documents.** The rulemaking process that the APA established also facilitated the eventual start of “presidential review” of agency rulemaking, which has been undertaken in one form or another since 1971. The current process was established through E.O. 12866.⁶⁰ The E.O. requires departments and agencies (but not independent regulatory agencies) to submit all “significant” proposed and final regulatory actions to OIRA for review before they are published in the *Federal Register* and take effect. OIRA may return some draft proposed and final rules to agencies for “reconsideration,” as discussed in **Box 2**. The E.O. requires some transparency for “formal” OIRA reviews of draft proposed and final rules, but not for “informal” reviews. Congress has used statutory provisions added to OMB’s appropriation to limit the scope of certain OMB reviews.

Discussion in **Appendix C** of the APA and four examples of OMB involvement in agency decision making (and associated congressional responses) may inform congressional consideration of potential options that relate to the process outlined in OMB’s May 2005 memorandum.

Potential Options for Congressional Consideration

The process outlined by OMB’s May 2005 memorandum may raise issues for Congress relating to congressional intent for mandatory spending, agency use of discretion, and the possibility of OMB involvement in agency decision making on behalf of the President. In approaching the subject of OMB controls on agency mandatory spending, Congress might consider at least five general options. First, if Congress sees no current need to engage in lawmaking or oversight of the process, it might continue with the status quo. Second, if Congress wished to learn more about the process, as practiced currently or in the past, Congress could conduct related oversight through hearings and inquiry. In posing certain questions, scrutiny associated with this kind of oversight may indirectly affect how OMB implements its process. In addition, Congress might wish to have more information before considering legislative options, if it were concerned about potential unintended consequences from legislating. If Congress wished to address the topic prospectively through lawmaking, Congress might consider three additional options: increasing transparency of OMB’s process, legislating in greater detail, or modifying how OMB’s process operates. The latter three options also might be considered in combination. Each of the five general options is discussed below along with potential implications.

General Option 1: Continue with Status Quo

Congress might consider proceeding with the status quo. Under this option, the process outlined in the OMB May 2005 memorandum presumably would continue in some form with very limited transparency outside the executive branch. To the extent agency administrative actions already were subject to requirements for transparency and public participation (e.g., “rules” under the APA), these practices would continue. If the OMB process were utilized, the Administration would twice per year establish a baseline spending projection to which agency mandatory spending levels would be held, unless the Administration made exceptions or agencies could

⁶⁰ 58 *Federal Register* 51735 (October 4, 1993).

persuade OMB that cost-increasing administrative actions were required by law. Advocates of this option might argue that the President and OMB would use this process to prevent increases in mandatory spending that are not required by law, and that directing agencies in this way should be considered pre-decisional and therefore viewable only within parts of the executive branch until agencies act or otherwise are required to disclose actions. The Bush Administration justified use of the process by saying “[a] significant amount of Federal policy is made via administrative action, which can increase Federal spending, often on the order of tens of billions of dollars in entitlement programs such as Medicare or Medicaid,” and that agencies “frequently initiate unplanned for and costly proposals.”⁶¹

Critics of the status quo option might argue that the process outlined in OMB’s May 2005 memorandum could be used by the President in an effort to displace statutory authority vested in agencies, and that agencies have a higher likelihood of following congressional expectations and intent than OMB, which acts on behalf of the President’s policy preferences. Critics also might enlist arguments like those below, in support of alternative options to conduct investigatory oversight, increase transparency, legislate in detail, or modify OMB’s process. A separate group of critics might view the status quo as providing inadequate leverage for the President, because OMB does not have explicit statutory authority to disapprove agency administrative actions.

General Option 2: Conduct Investigative Oversight of OMB’s Process

As a second general option, Congress might conduct oversight through the use of hearings or other forms of investigative inquiry of how agencies and OMB have operated in the past, or currently operate, under OMB’s process.⁶² In addition, if Congress wished to consider options that involve lawmaking, the use of oversight tools to gain more information about OMB’s process might help prevent unintended consequences from legislating.

If Congress wished to learn more about the process, how it has been used, and what its effects have been, a number of topics might be investigated or studied. For example, little is publicly known about the scope and effect of OMB’s controls on mandatory spending programs. Potential avenues of inquiry related to this topic might include the following:

- establishing which agencies and programs have been subject to OMB’s process;
- determining what its effects on program outputs, outcomes, and spending have been;
- discovering what the process’s impact has been on the activities, capacity, and workload of agency budget, legal, policy analysis, and program offices; and
- ascertaining how the process has worked in practice (e.g., the extent to which OMB has judged agency-submitted offsets to be “inappropriate,” returned submissions for reconsideration, or granted exceptions to the process’s offset requirement “in light of extraordinary need or other compelling circumstances”).

In addition, it is not clear whether agencies’ administrative actions and corresponding mandatory spending changes have been consistent with congressional intent or expectations. Related questions might include whether agencies have consulted with congressional authorizing committees before submitting administrative actions to OMB or taking action.

⁶¹ OMB, *FY2009 Analytical Perspectives*, p. 216.

⁶² For a menu of potential strategies, see CRS Report RL30240, *Congressional Oversight Manual*, by Frederick M. Kaiser et al.

Another potential line of inquiry might involve how the Administration's baseline has been used. Because the OMB memorandum's definition of an "increase in mandatory spending" is relative to a baseline that is easily revised by OMB,⁶³ it is conceivable that a President or OMB could use the baseline proactively as a policy lever in an attempt to direct agency uses of discretion in mandatory spending programs. For example, it is conceivable that an Administration might assume that a longstanding agency practice, which nevertheless is not required by law, does not continue. If discontinuance of the practice would save funds, an agency's plan to continue with the practice technically might be interpreted by OMB as an "increase in mandatory spending," which under the OMB memorandum would require the agency to propose offsets. Hence it is conceivable that OMB could proactively cause certain agency practices to become "proposals" for purposes of the OMB memorandum.⁶⁴

General Option 3: Prospectively Increase Transparency of OMB's Process

Congress also might consider legislating on this subject to increase transparency prospectively. Especially in this area, prior congressional approaches to agency use of discretion and OMB involvement in agency decision making may inform congressional options (see **Appendix C**). As a threshold matter, additional transparency could be pursued on an agency-specific or government-wide basis. In either case, Congress might seek increased transparency at one or more stages of agency and OMB activity, including (1) at the time of initial agency submission of a "proposal" to OMB; (2) after an OMB determination, but in advance of agency implementation; (3) at the beginning of agency implementation; and (4) after implementation has begun. At stage (1), for example, Congress might consider as a model the exceptions it has legislated for submission of budget information or agency testimony directly to Congress before modification by OMB. Alternatively, Congress might consider establishing an APA-like or PRA-like process for agency submissions to OMB, the President, or an entity in the Executive Office of the President, albeit without allowing OMB to conduct "informal" reviews of the submissions before they are published for public comment. Analogous to the APA or PRA, such a process might provide for advance publication, public participation, and congressional insight into the trade-offs that OMB and agencies consider. Because this option would provide some advance notice to Congress, Congress might have an opportunity to conduct oversight or legislate on the topic. At stage (2), Congress might consider establishing an APA-like or PRA-like process for agency administrative actions reviewed and approved by OMB but not yet implemented. Such a process might provide for advance publication and public participation, while still allowing OMB to conduct a prior review.⁶⁵ At stages (3) or (4), Congress might consider reporting requirements for agency administrative actions pursued after OMB review, including cost-increasing and cost-reducing actions. This option would not provide advance notice to Congress.

⁶³ For purposes of identifying discretionary administrative actions that would be subject to the OMB memorandum's requirements for offsets, the memorandum defined "increase in mandatory spending" as an increase relative to the Administration's most recently published baseline projection. This baseline is driven not only by current law, but also by the President's economic and "major programmatic assumptions." OMB has explained that the latter "major programmatic assumptions" include, among other things, assumptions about the number of beneficiaries who will receive payments, "the timing and substance of regulations that will be issued over the projection period, the use of administrative discretion provided under current law, and other assumptions about the way programs operate" (OMB, *FY 2011 Analytical Perspectives*, pp. 377-378, 387).

⁶⁴ The reverse also appears to be possible. If OMB assumed a new administrative practice in its baseline projection, and if the new practice were estimated to increase mandatory spending compared to current practice, then an agency plan to implement the new practice (and therefore increase mandatory spending, other things being equal) would not constitute an "increase in mandatory spending" under the memorandum's definitions.

⁶⁵ Congress also could anticipate the possibility of "informal" OMB reviews by including limited information about reviews within the scope of transparency, or could leave room for OMB to conduct such reviews without transparency.

Advocates of increased transparency might argue that OMB's current process makes it difficult or impossible to know whether OMB and agencies were acting consistently with congressional expectations or intent. In addition, advocates might argue that administrative actions with substantial implications for spending are legislative in nature, even if they do not fall under the APA's definition of "rule," and therefore should be subject to transparency and public participation. Critics of increased transparency might argue that the transparency would weaken the President's influence over agencies, or that the President should have substantial leverage over agency mandatory spending activities. In addition, critics might argue that transparency would impede open communications within the executive branch on how to best implement current law.

General Option 4: Legislate in Greater Detail

If Congress were dissatisfied with the OMB process, Congress might consider legislating in greater detail to reduce the discretion that agencies might exercise when implementing mandatory programs. By reducing agency discretion, Congress might lessen the ability of OMB to involve itself in agency decision making and thereby potentially prevent deviations from congressional intent. Legislating in greater detail would be done at the agency or program-specific level by individual authorizing committees, if the committee process were used to move legislation.

Legislating in greater detail may put more responsibility on Congress to anticipate a range of implementation issues that otherwise could be left to agencies. If agencies are prevented from exercising authority to adjust the implementation of mandatory programs or pursue emerging policy priorities, the outcome of a program may rest more squarely with Congress. In addition, if detailed program parameters or requirements that are set in statute are not optimized initially and need to be adjusted (e.g., to fix a faulty assumption), legislative action may take relatively longer than administrative action. This could put program costs or participation in jeopardy compared to congressional intent.⁶⁶ Depending on the direction of the change, revising legislative details could have adverse statutory PAYGO implications for authorizing committees that otherwise might not occur had implementation been left to an agency. Thus, there could be some substitution of budget challenges between OMB's process and legislating in detail. In some circumstances, Congress may be reluctant to "reopen" authorizing language before it expires because of unrelated program requests that could complicate the legislative process.

General Option 5: Statutorily Modify OMB's Process

Congress might consider statutorily modifying the process outlined in OMB's May 2005 memorandum, either on an agency-specific or government-wide basis. For example, Congress might enact into law OMB's process while giving OMB explicit authority to approve agency actions, perhaps modeled on the PRA (see **Appendix C**). Alternatively, Congress might prohibit OMB from implementing the memorandum, perhaps modeled on how Congress has restricted OMB reviews of agricultural marketing regulations (see **Appendix C**'s discussion under "OMB Review of Agency Rules and Guidance Documents").⁶⁷ Congress also could consider requiring reviews to be conducted by congressional authorizing committees or the Senate and House Budget Committees instead of OMB, perhaps by using CBO's baseline spending projection

⁶⁶ For example, Congress could use "shall" rather than "may" in the statutory language for a mandatory program, in order to remove discretion regarding how large a program may be. Although this action might be sufficient to avoid OMB's mandatory spending controls, unintended policy consequences could arise from the use of more detailed or restrictive language, such as preventing an agency from adjusting a program in response to economic conditions.

⁶⁷ See also CRS Report RS20846, *Executive Orders: Issuance and Revocation*, by Vanessa K. Burrows.

instead of the Administration's baseline, provided that the authorizing committees did not engage in executive functions.

Because many variations on this option could be considered, advocates and critics of these variations might bring to bear a variety of arguments in support or opposition. In many cases, procedural arrangements may have significant implications for power relationships among Congress, the President, and agencies. For example, it could be argued that giving statutory authority to OMB to approve or disapprove agency use of discretion for mandatory spending would give the President considerable legal leverage over the activities of agencies and enhanced bargaining power with Congress. Conversely, it could be argued that prohibiting OMB from conducting such reviews would strengthen Congress's influence over agencies' mandatory spending programs by limiting presidential influence. In any case, due to the lack of transparency of OMB's process outside the executive branch, Congress might wish to gain more information about past and current OMB and agency practices to inform future decision making and avoid unintended consequences.

Appendix A. Facsimile of OMB Memorandum M-05-13



THE DIRECTOR

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

M-05-13

May 23, 2005

MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES

FROM: Joshua B. Bolten 
SUBJECT: Budget Discipline for Agency Administrative Actions

As announced in the President's Fiscal Year 2006 Budget (p. 27) and in keeping with the Administration's goal of restraining Federal spending growth to sustain long-term economic growth, the Office of Management and Budget (OMB) is implementing a budget-neutrality requirement on agency administrative actions affecting mandatory-spending programs. We have asked the Congress to live by pay-as-you-go rules for mandatory-spending legislation, and we should observe a similar discipline.

Effective immediately, the following guidance shall apply to administrative actions that would increase mandatory spending¹:

1. As part of any proposed discretionary agency administrative action that would increase mandatory spending, the agency must include one or more proposals for other administrative actions to be taken by the agency that would comparably reduce mandatory spending. Proposals submitted without an offset will be returned to the agency for reconsideration.
2. In its annual budget submission to OMB, the agency shall include a list of all administrative actions planned or anticipated for the fiscal year covered by the submission that would increase mandatory spending in that or any subsequent fiscal year. Between annual budget submissions, the agency shall advise OMB of any anticipated administrative action that would increase mandatory spending as soon as possible after the agency becomes aware that the action is likely to occur. For discretionary administrative actions, the agency must identify offsets, pursuant to guidance paragraph 1.
3. Discretionary administrative actions covered by this guidance include regulations, demonstrations, program notices, guidance to states or contractors, or other similar actions not required by law that would increase mandatory spending. For purposes of this

¹ For purposes of this guidance, an "increase" in mandatory spending means an increase relative to the projection in the most recent Budget or Mid-Session Review of what is required, under current law, to fund the mandatory-spending program.

memorandum, the term "administrative action" includes actions not normally subject to OMB review. Questions concerning whether a proposed discretionary administrative action is a "similar action" subject to this paragraph will be resolved by the OMB Director at his discretion. If an agency determines that a proposed administrative action that would increase mandatory spending is required by law and therefore does not permit the exercise of discretion, the agency's general counsel must provide an opinion explaining that conclusion.

4. All materials submitted to OMB in this context should include a first-year cost estimate and, whenever possible, five- and ten-year cost estimates provided by the agency's chief actuary or, in the absence of an actuary, the chief budget or policy officer. When there is a difference between cost estimates for the action as submitted for review and as assumed in the most recent projection in the Budget or Mid-Session Review, the agency must explain the discrepancy.
5. If OMB determines that a proposed offset is inappropriate, OMB may request that the agency propose alternative offsets. Changes in baseline estimates due to economic or technical reasons, as opposed to policy actions, are not to be considered offsets.
6. Exceptions to the budget-neutrality requirement set forth in this guidance must be requested by the agency head and will be granted only when the OMB Director determines that the exception is appropriate in light of extraordinary need or other compelling circumstances. The agency head may appeal to the Budget Review Board.

Thank you for your cooperation in this important undertaking. For more information, please contact your OMB representative.

Appendix B. Tabular Displays of FY2009 Mandatory Outlays

The tables below provide several perspectives on how mandatory spending may be categorized, including by House authorizing committee (**Table B-1**), Senate authorizing committee (**Table B-2**), and programmatic area (**Figure B-1** and **Figure B-2**).

Table B-1. Mandatory FY2009 Outlays, by House Authorizing Committee
(\$ in millions)

House Authorizing Committee	FY2009 Net Outlays
Agriculture	76,500
Armed Services	30,128
Education and Labor	2,439
Energy and Commerce	603,990
Financial Services	283,626
Foreign Affairs	-2,553
Homeland Security	954
House Administration	164
Judiciary	4,897
Natural Resources	-5,502
Oversight and Government Reform	39,605
Science and Technology	90
Small Business	1,210
Transportation and Infrastructure	15,369
Veterans' Affairs	48,812
Ways and Means	1,020,441
Permanent Select Intelligence	279
Unassigned	-26,820
Total	2,093,629

Source: CBO.

Notes: Outlay figures are net of offsets to gross mandatory spending. Offsets may include “offsetting receipts” (certain types of payments that federal agencies receive from the public and other government agencies), subsidy reestimates for credit programs, and changes for credit liquidating accounts. Entries with negative outlays indicate that offsets exceed gross mandatory spending (if any). CBO lists some outlays and offsets as “unassigned” to authorizing committees. These are listed separately in the table, in aggregate.

Table B-2. Mandatory FY2009 Outlays, by Senate Authorizing Committee
(\$ in millions)

Senate Authorizing Committee	FY2009 Net Outlays
Agriculture, Nutrition, and Forestry	91,968
Armed Services	126,304
Banking, Housing, and Urban Affairs	287,525
Commerce, Science, and Transportation	16,849
Energy and Natural Resources	5,168
Environment and Public Works	1,976
Finance	1,956,661
Foreign Relations	22,713
Health, Education, Labor, and Pensions	3,445
Homeland Security and Governmental Affairs	98,317
Indian Affairs	625
Judiciary	9,637
Rules and Administration	69
Small Business and Entrepreneurship	1,210
Veterans' Affairs	49,173
Permanent Select Intelligence	279
Unassigned	-578,290
Total	2,093,629

Source: CBO.

Notes: Outlay figures are net of offsets to gross mandatory spending. Offsets may include “offsetting receipts” (certain types of payments that federal agencies receive from the public and other government agencies), subsidy reestimates for credit programs, and changes for credit liquidating accounts. Entries with negative outlays indicate that offsets exceed gross mandatory spending (if any). CBO lists some outlays and offsets as “unassigned” to authorizing committees. These are listed separately in the table, in aggregate.

Figure B-1. CBO Programmatic Display of Mandatory Spending (Part I)

CBO's Baseline Projections of Mandatory Spending														
(Outlays, in billions of dollars)														
	Actual												Total, 2011-2015	Total, 2011-2020
	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020		
Social Security	678	700	726	759	797	836	878	927	982	1,041	1,103	1,170	3,996	9,220
Medicare ^a	499	528	574	581	638	710	735	794	830	867	962	1,038	3,238	7,729
Medicaid	251	280	268	270	283	302	323	346	371	398	427	458	1,446	3,445
Income Security														
SNAP	56	70	75	75	74	71	69	67	65	62	62	61	365	681
Unemployment compensation	119	133	83	66	53	47	48	50	52	53	55	56	298	564
Supplemental Security Income	45	48	54	47	53	54	54	61	57	53	60	61	262	554
Earned income and child tax credits	67	72	69	42	43	44	45	44	44	45	45	45	244	467
Family support ^b	26	28	26	25	25	25	25	25	25	25	25	25	124	249
Child nutrition	16	17	18	19	20	20	21	22	23	24	24	25	98	216
Foster care	7	7	7	7	8	8	8	8	8	9	9	9	38	82
Making Work Pay and other tax credits ^c	13	24	19	*	*	*	*	*	*	*	*	*	20	22
Subtotal	348	400	352	282	275	270	270	277	274	271	281	283	1,449	2,834
Civilian and Military Retirement														
Federal civilian ^d	80	83	85	87	90	93	95	99	102	106	109	113	450	979
Military	50	51	51	52	53	54	55	57	58	60	61	63	266	565
Other	8	8	7	7	8	9	10	11	11	11	12	12	41	98
Subtotal	138	141	143	147	151	156	160	166	171	177	182	188	757	1,642
Veterans ^e														
Income security	46	49	56	50	56	57	58	64	60	56	62	63	276	581
Other	4	8	10	11	11	12	12	13	14	14	15	16	57	128
Subtotal	50	57	66	61	67	68	70	77	74	70	77	79	333	710
Other Programs														
Fannie Mae and Freddie Mac ^f	91	21	13	10	8	6	6	5	4	3	3	3	45	64
TARP	152	-67	4	4	3	3	*	*	*	*	*	*	15	16
Agriculture	17	19	18	12	17	16	16	16	16	16	17	17	80	161
MERHCF	8	8	9	9	10	11	12	13	14	15	16	17	50	124
Higher education	-18	-10	-2	-1	-1	-1	5	6	8	9	9	10	0	43
Universal Service Fund	8	8	9	9	9	9	9	9	9	9	9	9	44	90
CHIP	8	9	10	11	12	10	6	6	6	6	6	6	50	79
Social services	5	5	5	5	5	5	5	5	5	5	6	6	26	53
Deposit insurance	23	-4	12	-3	-18	-18	-17	-14	-9	-7	-4	-5	-44	-83
Other	32	33	36	33	31	28	26	25	29	29	29	30	154	295
Subtotal	325	22	113	91	77	70	68	71	82	86	91	92	420	843

Continued

Source: CBO, *The Budget and Economic Outlook: Fiscal Years 2010 to 2020*, January 2010, p. 52.**Notes:** The second part of CBO's Table 3-3 includes footnotes and is located in the next figure.

Figure B-2. CBO Programmatic Display of Mandatory Spending (Part 2)

(Outlays, in billions of dollars)															Total, 2011 - 2015	Total, 2011 - 2020
	Actual															
	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020				
Offsetting Receipts																
Medicare ^a	-74	-78	-86	-87	-93	-102	-107	-113	-120	-128	-139	-150	-475	-1,126		
Employers' share of employees' retirement	-56	-60	-62	-63	-64	-66	-69	-71	-74	-77	-80	-83	-324	-711		
Other	-65	-45	-50	-52	-54	-55	-57	-59	-65	-66	-66	-68	-268	-591		
Subtotal	-195	-183	-198	-203	-211	-223	-232	-244	-259	-271	-285	-302	-1,067	-2,428		
Total Mandatory Spending	2,094	1,946	2,045	1,989	2,077	2,188	2,272	2,414	2,524	2,638	2,838	3,008	10,572	23,994		
Memorandum:																
Mandatory Spending Excluding																
Offsetting Receipts	2,289	2,129	2,243	2,192	2,288	2,411	2,504	2,658	2,783	2,909	3,124	3,310	11,639	26,422		
Medicare Spending Net of																
Offsetting Receipts	425	450	487	494	545	608	628	680	709	739	824	888	2,763	6,603		

Source: Congressional Budget Office.

Notes: Spending for the benefit programs shown above generally excludes administrative costs, which are discretionary.

SNAP = Supplemental Nutrition Assistance Program; TARP = Troubled Asset Relief Program; MERHCF = Department of Defense Medicare-Eligible Retiree Health Care Fund (including TRICARE for Life); CHIP = Children's Health Insurance Program;

* = between zero and \$500 million.

a. Excludes offsetting receipts (funds collected by government agencies from other government accounts or from the public in businesslike or market-oriented transactions that are recorded as offsets to outlays).

b. Includes Temporary Assistance for Needy Families and various programs that involve payments to states for child support enforcement and family support, child care entitlements, and research to benefit children.

c. This category also includes outlays for the following: the First-Time Homebuyer Credit; the American Opportunity Tax Credit; acceleration of Research and Experimentation Tax Credits in lieu of bonus depreciation; payments made when the credit for the alternative minimum tax exceeds a taxpayer's liability; and income tax rebates that result from the Economic Stimulus Act of 2008 (Public Law 110-185) and the American Recovery and Reinvestment Act of 2009 (P.L. 111-5).

d. Includes Civil Service, Foreign Service, Coast Guard, and other, smaller retirement programs as well as annuitants' health benefits.

e. Income security includes veterans' compensation, pensions, and life insurance programs. Other benefits are primarily education subsidies.

f. The amount recorded for 2009 reflects cash transfers from the Treasury to Fannie Mae and Freddie Mac. The amounts shown for 2010 through 2020 reflect CBO's estimate of the subsidy cost of new loans and guarantees made by those two entities in each year, adjusted for market risk.

g. Includes Medicare premiums and amounts paid by states from savings on Medicaid prescription drug costs.

Source: CBO, *The Budget and Economic Outlook: Fiscal Years 2010 to 2020*, January 2010, p. 53.

Notes: The first part of CBO's Table 3-3 is located in the prior figure.

Appendix C. Prior Congressional Approaches to Agency Discretion and OMB Involvement

Grants of Administrative Discretion and the Administrative Procedure Act

Congress historically has expressed strong interest that agencies execute laws in a manner that is consistent with congressional intent and expectations. As a result, Congress often legislates in detail when it directs agencies, or sometimes the President, to undertake certain tasks. At other times, however, when laws are formulated in ways that allow a measure of discretion in their implementation, Congress may use a variety of constitutional, statutory, and political tools to direct and constrain agencies (or the President) and hold them to account.⁶⁸ When granting discretion to agencies, Congress's approach arguably reached a turning point with enactment in 1946 of the Administrative Procedure Act (APA).⁶⁹ By that time, a variety of factors—including industrialization, urbanization, the Progressive Movement, efforts to combat the Great Depression, and two world wars—had led to an expansion in the scope of the federal government's activities. To deal with the complexity, "Congress had become a delegator, vesting much of its legislative authority in administrative agencies, and a great deal of the initiative for policy making and budgeting had passed to the executive branch."⁷⁰ In response, Congress passed measures to enhance its lawmaking and oversight capacities. These laws included the APA, which among other things was enacted to subject agency use of discretion through rulemaking to transparency and public participation.⁷¹

As codified in Title 5 of the *United States Code*, the APA defines the term "rule," in part, as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."⁷² The law also establishes procedural requirements for how agencies may make, amend, and repeal rules, which together generally are called "rulemaking."⁷³ The law requires, among other things, that an agency publish a notice of proposed rulemaking in the *Federal Register*, afford interested persons an opportunity to participate in the proceeding through the submission of written comments, and when

⁶⁸ For example, Congress may use its constitutional power of the purse to channel agency behaviors by providing expressly in statute for how funds are to be used, or how some uses of funds are prohibited. Statutes that provide for transparency also may be used to highlight inconsistencies with congressional intent and to bring political pressure on agencies or the President. At other times, Congress may use its implied constitutional power of inquiry and investigation to inform itself and potentially deter deviations from congressional intent. Congress also may use non-statutory means to communicate to agencies its directions and the likely consequences of any defection. See also David Epstein and Sharyn O'Halloran, *Delegating Powers* (Cambridge, UK: Cambridge University Press, 1999).

⁶⁹ P.L. 404, 79th Cong.; 60 Stat. 237; 5 U.S.C. § 551 et seq.

⁷⁰ David H. Rosenbloom, *Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946-1999* (Tuscaloosa, AL: University of Alabama Press, 2000), p. 1.

⁷¹ For discussion, see George B. Shepherd, "Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics," *Northwestern University Law Review*, vol. 90 (1996), pp. 1557-1683; and CRS Report RL30795, *General Management Laws: A Compendium*, by Clinton T. Brass et al.

⁷² 5 U.S.C. § 551(4).

⁷³ The APA provides for both formal and informal rulemaking. Formal rulemaking is used when rules are required by statute to be made "on the record" after an opportunity for a trial-type agency hearing. Informal rulemaking, also known as "notice and comment" rulemaking, is used much more frequently. For discussion of the rulemaking process, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, by Curtis W. Copeland.

consideration of the matter is completed, incorporate in any adopted rules “a concise general statement of their basis and purpose.” According to one scholar, because agencies were exercising delegated legislative authority, Congress’s intention was that agencies’ “processes should embrace the legislative values of representation, participation, and open information.”⁷⁴

Congressional Authorizations of, and Responses to, OMB Involvement in Agency Decision Making

Congress was not alone in noticing how agencies may exercise discretion. Presidents oftentimes pursue their policy preferences by attempting to influence or control agency decision making through organizational and procedural means. Consequently, various Presidents have initiated OMB’s involvement in some agency decision making processes. In other instances, however, OMB’s role began at the requirement of Congress through statute, when Congress wished for agencies to be subject to additional oversight or direction. As noted earlier, in many cases, Congress responded to the prospect or reality of OMB’s involvement with legislation.

Agency Submissions of Budget Information and Requests

The Budget and Accounting Act of 1921 established in law the duty of the President to submit each year a single, consolidated budget proposal for congressional consideration.⁷⁵ It meant that the President was responsible for making budget requests, so that each executive department and agency would no longer act independently of presidential direction. Support for the law grew out of Progressive Era views that placed little trust in legislative institutions and sought to shift more authority to executive institutions, and also emerged out of budgetary stresses from World War I.⁷⁶ As amended and recodified, one of the act’s key provisions restricts agency officers and employees from submitting “to Congress or a committee of Congress an appropriations estimate or request, a request for an increase in that estimate or request, or a recommendation on meeting the financial needs of the Government” unless “requested by either House of Congress” (31 U.S.C. § 1108(e)). Currently, OMB issues annual directions to agencies on how to put together budget requests for potential modification by the President, before the requests are submitted to Congress.⁷⁷ OMB then manages the process of assembling the President’s budget proposal. Over time, however, Congress has established multiple statutory exceptions to the law.⁷⁸ These

⁷⁴ David H. Rosenbloom, *Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946-1999* (Tuscaloosa, AL: University of Alabama Press, 2000), p. 3.

⁷⁵ P.L. 13, 67th Cong. This requirement is now codified at 31 U.S.C. § 1105. The act is formally cited as the “Budget and Accounting Act, 1921” (42 Stat. 20), but it is more commonly cited as the “Budget and Accounting Act of 1921.”

⁷⁶ See CRS Report RL30795, *General Management Laws: A Compendium*, by Clinton T. Brass et al., p. 98; and Louis Fisher, *Presidential Spending Power* (Princeton, NJ: Princeton University Press, 1975), pp. 31-35. In anticipation of criticisms that such a change would be an abdication of legislative prerogatives, a House select committee that reported a version of the legislation argued “[t]he bill does not in the slightest degree give the Executive any greater power than he now has over the consideration of appropriations by Congress” (U.S. Congress, House Select Committee on the Budget, *National Budget System*, report to accompany H.R. 9783, 66th Cong., 1st sess., H.Rept. 362 (Washington: GPO, Oct. 8, 1919), p. 7). Nonetheless, most subsequent scholarship has concluded that the proposal eventually enacted as the Budget and Accounting Act of 1921 did, in practice, give the President more power over the appropriations process. For example, see Kenneth R. Mayer and Thomas J. Weko, “The Institutionalization of Power,” in Robert Y. Shapiro, Martha Joynt Kumar, and Lawrence R. Jacobs, eds., *Presidential Power: Forging the Presidency for the Twenty-First Century* (New York: Columbia University Press, 2000), pp. 193-198.

⁷⁷ OMB, *Circular A-11*, August 2009.

⁷⁸ Examples include the Social Security Administration and U.S. Postal Service. For a list of the agencies that was released by OMB, see Clinton T. Brass, “Performance Management for Networked Government: A Transformation in

provisions allow or require certain agencies to provide budgetary information or annual budget requests directly to Congress without first submitting them to OMB or the President, or to provide them concurrently to Congress and the President, before potential modification by the President.⁷⁹ OMB appears to acknowledge and abide by statutory authorities for agencies to directly submit budget and other information to Congress.⁸⁰

OMB Clearance of Agency Testimony and Draft Legislation

Reorganization Plan No. 1 of 1939 transferred the predecessor of OMB to its location in the newly created Executive Office of the President.⁸¹ Executive Order (E.O.) 8248 followed soon thereafter to “effectuate the purposes” of the reorganization and provide “adequate machinery for the administrative management of the Executive branch of the Government” to the President.⁸² As amended, the E.O.’s Section II.2.(e) assigns to OMB the duty to “assist the President by clearing and coordinating departmental advice on proposed legislation.” The E.O. effectively directs OMB to review and modify many documents that agencies produce for congressional recipients (e.g., testimony and correspondence), in order to ensure compliance with the President’s policy agenda and coordination across agencies.

Congress sometimes has responded by providing agencies with statutory authority to submit such materials directly to Congress, bypassing OMB.⁸³ OMB has said it recognizes such exceptions.⁸⁴

OMB and the Paperwork Reduction Act⁸⁵

The Paperwork Reduction Act (PRA) of 1980 established OIRA within OMB to provide central leadership and oversight of government-wide efforts to reduce unnecessary paperwork burden

Waiting?”, paper presented at the 2007 annual conference of the American Society for Public Administration, Washington, DC, Mar. 25, 2007, pp. 8, 15, at <http://www.aspanet.org/source/Communities/documentArchive.cfm?section=Communities&CmtId=178&ParID=309>.

⁷⁹ Notwithstanding objections raised by the Department of Justice’s Office of Legal Counsel (OLC) and presidential signing statements, particularly since the 1980s, a CRS review of “applicable and pertinent constitutional and legal precedents” indicated that “direct reporting provisions,” which include budgetary “bypass” provisions that are the subject of this section, “are well within the Congress’s constitutional authority to inform itself in order to perform its legislative function, which has been consistently acknowledged by Supreme Court decisions, and dates back to the early enactments of the First Congress in 1789.” See CRS Congressional Distribution Memorandum, *Legal Substantiality of Direct Reporting Requirements*, by Morton Rosenberg, June 2, 2006.

⁸⁰ Section 25 of *Circular A-11* lists several agencies that are “not subject to Executive Branch review by law or custom,” including some that OMB characterizes as being in the executive branch (e.g., certain marketing activities in the Department of Agriculture, the U.S. Postal Service, and the Board of Governors of the Federal Reserve System).

⁸¹ 53 Stat. 1423. The Reorganization Act of 1939 (53 Stat. 561; later amended and expired) allowed such plans to go into effect unless the House and Senate within 60 days passed a concurrent resolution disapproving the plan.

⁸² E.O. 8248, “Establishing the Divisions of the Executive Office of the President and Defining Their Functions and Duties,” 3 C.F.R. 1938-1943 Comp., p. 576, as amended by E.O. 12608.

⁸³ Examples include the Consumer Product Safety Commission and Federal Aviation Administration. For a list of the agencies that was released by OMB, see Clinton T. Brass, “Performance Management for Networked Government: A Transformation in Waiting?”, paper presented at the 2007 annual conference of the American Society for Public Administration, Washington, DC, Mar. 25, 2007, pp. 8, 15.

⁸⁴ In OMB’s *Circular No. A-19*, which governs the OMB clearance process, Section 4 acknowledges that some agencies have statutory requirements to transmit legislative proposals, reports, or testimony to Congress “without prior clearance” and states that they are not “subject to the provisions of this Circular” (OMB, *Circular No. A-19*, “Legislative Coordination and Clearance,” revised Sept. 20, 1979, at <http://www.whitehouse.gov/omb/circulars/a019/a019.html>).

⁸⁵ Curtis W. Copeland, Specialist in American National Government, wrote this section.

and improve management of information resources.⁸⁶ The law was amended in 1995 (PRA of 1995).⁸⁷ If a covered agency (departments, independent agencies, and independent regulatory agencies) wants to collect information from 10 or more non-federal persons, or to require 10 or more persons to provide information to a third party or to the public, that information collection or disclosure requirement probably is covered by the PRA. The law provides for transparency and public participation in several ways. After an agency submits its proposed information collection request to OIRA, the PRA requires OIRA to provide at least 30 days for public comment prior to deciding whether to approve the request.⁸⁸ This comment period is in addition to the 60 days of public comment that are required prior to submission of the proposed collection to OIRA. OIRA maintains a daily-updated database showing each approved collection by agency, collection requests that are under review, collections that have been reviewed in the previous 30 days, and collections that have recently expired.⁸⁹ The PRA also requires OIRA to keep Congress and congressional committees “fully and currently informed of the major activities” under the act.⁹⁰ Specifically, the act requires OIRA to submit an annual report to the President of the Senate and the Speaker of the House of Representatives describing, among other things, the extent to which agencies have reduced information collection burdens on the public. To satisfy the requirement, OIRA develops an annual Information Collection Budget (ICB) by gathering data from agencies.⁹¹

OMB Review of Agency Rules and Guidance Documents⁹²

The current process of presidential review of rulemaking was established by President William Clinton in October 1993 through E.O. 12866, which revoked previous orders.⁹³ The E.O. requires departments and agencies (but not independent regulatory agencies) to submit all “significant” proposed and final regulatory actions to OIRA for review before they are published in the *Federal Register*.⁹⁴ The order defines a “significant” regulatory action as one that may, among other things, have a \$100 million impact on the economy, create a serious inconsistency with actions by another agency, or raise “novel legal or policy issues arising out of ... the President’s priorities.”⁹⁵

OIRA conducts formal reviews under the E.O. that are subject to some transparency, but it also conducts informal reviews that are substantially not transparent. With regard to formal reviews, E.O. 12866 generally requires that OIRA complete them within 90 calendar days, and requires

⁸⁶ P.L. 96-511; 94 Stat. 2812; codified at 44 U.S.C. § 3501 et seq. For more detailed discussion of the PRA, see CRS Report R40636, *Paperwork Reduction Act (PRA): OMB and Agency Responsibilities and Burden Estimates*, by Curtis W. Copeland and Vanessa K. Burrows.

⁸⁷ P.L. 104-13; 109 Stat. 163.

⁸⁸ 44 U.S.C. § 3507(b). OIRA takes action on between 3,000 and 5,000 information collection requests each year.

⁸⁹ Available at <http://www.reginfo.gov/public/do/PRAMain>.

⁹⁰ 44 U.S.C. § 3514(a)(1)(A).

⁹¹ To view ICBs from recent years, see http://www.whitehouse.gov/omb/inforeg_infocoll/#icbusg.

⁹² Curtis W. Copeland, Specialist in American National Government, wrote this section.

⁹³ 58 *Federal Register* 51735 (October 4, 1993). Presidential review and oversight of regulation has been in effect, in one form or another, since 1971. For more detailed discussion of this topic, from which this section draws, see CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, by Curtis W. Copeland.

⁹⁴ Section 3(e) of the E.O. defines “regulatory action.” Some argued early in OIRA’s history that the office’s regulatory review role was unconstitutional, but few observers continue to hold that view. No court has directly addressed the constitutionality of the OIRA regulatory review process.

⁹⁵ E.O. 12866, Section 3(f).

both the agencies and OIRA to disclose certain information about how the reviews were conducted.⁹⁶ Specifically, the order says that agencies should identify for the public (1) the substantive changes made to rules between the draft submitted to OIRA for review and the action subsequently announced, and (2) changes made at the suggestion or recommendation of OIRA. OIRA also is required to provide agencies with a copy of all written communications with parties outside of the executive branch, and to maintain a public log of all regulatory actions under review. For some rules, there is an additional phase of “informal review” before a rule is officially submitted to OIRA. OIRA has indicated that it can have its greatest impact on agencies’ rules during these informal reviews. Former OIRA Administrator John Graham indicated that agencies’ “receptivity” to informal reviews may be enhanced by the possibility of a returned rule.⁹⁷

In January 2007, President Bush issued E.O. 13422, which changed the regulatory review process in several ways. Among other things, the order required that every agency head designate a presidential appointee within the agency as a “regulatory policy officer” who could control upcoming rulemaking in the agency, and expanded OIRA review to include significant guidance documents.⁹⁸ OMB characterized the executive order as a “good government” measure,⁹⁹ but the changes were highly controversial and were viewed by some as a “power grab” by the Bush Administration.¹⁰⁰ Many observers have viewed E.O. 13422 as part of a broader statement of presidential authority presented throughout the Bush Administration—from declining to provide access to certain information to presidential signing statements that indicated certain statutory provisions would be interpreted consistent with the President’s view of the “unitary executive.”¹⁰¹ On January 30, 2009, President Obama issued E.O. 13497, which revoked E.O. 13422 and returned E.O. 12866 to its original form.¹⁰² Notably, however, on March 4, 2009, OMB Director Orszag issued a memorandum to federal agencies stating that agency actions and documents, including, “significant policy and guidance documents,” would “remain subject to OIRA’s review under Executive Order 12866.”¹⁰³ In contrast to OMB’s formal review of rules, there is no requirement to disclose changes made to guidance as a result of OIRA reviews.

Congress has used provisions added to OMB’s appropriation to limit the scope of certain reviews. For example, since 1983, language has been included in OMB’s appropriation stating that none of the funds provided to OMB could be used for the purpose of reviewing any agricultural marketing orders issued by the Department of Agriculture “or any activities or regulations under

⁹⁶ OIRA reviews between 500 and 700 significant regulatory actions each year in its formal process.

⁹⁷ OMB, OIRA Administrator John D. Graham, Ph.D., “Stimulating Smarter Regulation: OMB’s Role,” July 17, 2002.

⁹⁸ Executive Order 12855 already required agencies to have regulatory policy officers; Executive Order 13422 required that they be presidential appointees and gave them additional authority to control rulemaking.

⁹⁹ Testimony of Steven D. Aitken, Acting Administrator, OIRA, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Amending Executive Order 12866: Good Governance or Regulatory Usurpation?*, hearings, 110th Cong., 1st sess., February 13, 2007.

¹⁰⁰ See Public Citizen, “New Executive Order Is Latest White House Power Grab,” at <http://www.citizen.org/pressroom/release.cfm?ID=2361>; and Margaret Kriz, “Thumbing His Nose,” *National Journal*, July 28, 2007, pp. 32-34.

¹⁰¹ For a discussion of the Bush Administration’s use of signing statements, see CRS Report RL33667, *Presidential Signing Statements: Constitutional and Institutional Implications*, by T. J. Halstead. More generally, see Adriel Bettelheim, “Executive Authority: A Power Play Challenged,” *CQ Weekly*, October 30, 2006, p. 2858.

¹⁰² E.O. 13497, “Revocation of Certain Executive Orders Concerning Regulatory Planning and Review,” 74 *Federal Register* 6113, February 4, 2009.

¹⁰³ OMB, memorandum from Peter R. Orszag, Director of OMB, to heads and acting heads of executive departments and agencies, “Guidance for Regulatory Review,” M-09-13, March 4, 2009, at http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-13.pdf.

the provisions of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 et seq.).”¹⁰⁴ Members of Congress have inserted this restriction in each appropriation bill, asserting that the Department of Agriculture, not OMB, has statutory authority in this area.

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¹⁰⁴ The language governing OIRA review of marketing orders during FY2010 is in P.L. 111-117 (123 Stat. 3169).